**IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON**

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| **In re the Marriage of:** | ) | **No. 26857-8-III** |
| **CARLEE JEANNE RAYMOND,** | ) | |
| **Respondent,** | ) | **Division Three** |
| **and** | ) | |
| **JOHN DUANE RAYMOND,** | ) | |
| **Appellant.** | ) | **UNPUBLISHED OPINION** |

Schultheis, C.J. — John Raymond appeals various decisions related to the dissolution of his marriage to Carlee Raymond. He contends: (1) the trial court should have entered a default judgment when his former wife did not appear for trial, (2) he was prejudiced because he was given no pretrial notice identifying the evidence that would be presented at trial, (3) he received insufficient notice of the presentment of the final papers and the proof of service of the proposed final papers upon him was also insufficient, (4) the court erred in calculating his income for child support, (5) the court erred by imposing restrictions on his residential contact with his child, (6) the court abused its discretion in

its distribution of the parties' assets and liabilities, and (7) his hearings and trial were unfair due to judicial bias.

We conclude that Mr. Raymond presents no reversible issues on appeal. We therefore affirm. We deny Ms. Raymond's request for attorney fees.

FACTS

Ms. Raymond and Mr. Raymond were married for over 20 years when they separated. Ms. Raymond filed a petition to dissolve their marriage. They have one child, Jenna, who was 17 years old by the time the decree was entered on January 25, 2008. Mr. Raymond acted pro se for the majority of the proceedings and Ms. Raymond was represented by an attorney, Terry Gobel.[1]

The decree divided the parties' liabilities and assets, including the family home, which was awarded to Ms. Raymond. The trial court found that Mr. Raymond had misled Ms. Raymond with regard to the community assets. As a consequence, Mr. Raymond was ordered by judgment to reimburse Ms. Raymond for a nearly $20,000 judgment entered against her by a bank from a loan Mr. Raymond took out and signed her name to without authority. He was also ordered to assume any tax liability associated with other of his specious financial dealings. The trial court awarded Ms. Raymond

[1] Mr. Raymond evidently had periodic representation by counsel. For the matters relevant to this appeal, however, he acted pro se.

85 percent of her attorney fees, a total of $41,953.28, based on Mr. Raymond's intransigence.

The court also entered a final parenting plan and order of child support, which imputed income to Mr. Raymond and restricted his contact with his child.

Mr. Raymond appealed to this court on February 11, 2008. In February, May, June, and July of 2008, he then made a series of failed motions to the trial court for posttrial relief. He did not appeal the decisions related to those motions.

## DISCUSSION

### a. Default

Mr. Raymond contends that the court erred by failing to enter a default when Ms. Raymond did not appear at trial. Ms. Raymond disputes the facts; she asserts that the trial date Mr. Raymond refers to was actually an appearance on the trial setting calendar at which time the ready cases were brokered out to judges for hearing. Mr. Raymond does not provide a record of the hearing to which he refers. Even if he did, it would be inappropriate to review the error for the first time on appeal. RAP 2.5(a).

The record does show, however, that Mr. Raymond made a postjudgment motion for default, which was heard by the setting judge who brokered Mr. Raymond's dissolution trial. According to the record for that hearing, the trial was scheduled for Monday, January 7, 2008, but it was actually commenced the next day, January 8.

Further, the trial setting notice that scheduled the trial for January 7, which is not a part of this record, evidently included the phrase "'or as otherwise directed by the clerk of the court.'" Report of Proceedings (RP) at 8. At the default hearing, the judge explained to Mr. Raymond the administrative events that occurred in the scheduling of the trial.

Mr. Raymond argued then, as he does now, that the trial court has a sua sponte duty to enter a default because Ms. Raymond did not appear at the setting calendar. Mr. Raymond provides no authority for his position. "[A] motion for default *may* be made" for the opposing party's failure to appear. CR 55(a)(1) (emphasis added). The record does not show that Mr. Raymond made such a motion. And even if he were to make a motion for default, Ms. Raymond would be entitled to notice of motion and to respond prior to hearing. CR 55(a)(2). It is therefore unlikely that Mr. Raymond would have gained a tactical advantage, which he now claims he lost due to the court's failure to enter a default.

Ms. Raymond also argues that the trial court did not err in denying Mr. Raymond's postjudgment motion for relief. Although Mr. Raymond's motion was not expressly made under any court rule, it could be deemed as a motion to re-open or vacate the judgment under CR 59 and/or CR 60. A trial court's decision under these rules is reviewed under the abuse of discretion standard. *In re Marriage of Dugan-Gaunt*, 82 Wn. App. 16, 18, 915 P.2d 541 (1996).

But Mr. Raymond did not appeal the decision on his postjudgment default motion. He may not raise the issues in the context of the appeal of the dissolution. *See* RAP 7.2(e) ("Except as provided in rule 2.4, a party may only obtain review of the decision on the postjudgment motion by initiating a separate review in the manner and within the time provided by these rules."). The issue is not preserved for appeal.

b. Admission of discovery at trial

Mr. Raymond contends that his interrogatory responses and deposition testimony were improperly admitted at trial. We review evidentiary rulings under the abuse of discretion standard. *Havens v. C&D Plastics, Inc*., 124 Wn.2d 158, 168, 876 P.2d 435 (1994). A trial court abuses its discretion if it is exercised on untenable grounds or for untenable reasons. *State ex rel. Carroll v. Junker*, 79 Wn.2d 12, 26, 482 P.2d 775 (1971).

CR 32(a) permits the use of Mr. Raymond's deposition against him at his dissolution trial. Nothing in the record shows that Mr. Raymond objected to the deposition for any purpose. He has waived any objection as to deposition errors or irregularities. CR 32(d). Further, nothing in the record shows that Mr. Raymond's interrogatories were improperly admitted under CR 33(b).

Mr. Raymond nonetheless claims that he should have received notice that the materials would be used against him at trial. The rules do not require such notice.

Moreover, the courtroom minutes note that the parties stipulated to the admission of the evidence.

c. Timely receipt of documents for presentment
Proof of service

Mr. Raymond's contention appears to have two parts, which relate to his timely receipt of the opposing party's proposed final dissolution documents to be considered for presentment and the proof of service of his receipt.

First, he asserts that he did not receive copies of the final papers in the amount of time required by rule prior to the presentment. Under CR 52(c), "the court shall not sign findings of fact or conclusions of law until the defeated party or parties have received 5 days' notice of the time and place of the submission, and have been served with copies of the proposed findings and conclusions." According to CR 54(f)(2), unless certain circumstances not present here exist, "No order or judgment shall be signed or entered until opposing counsel have been given 5 days' notice of presentation and served with a copy of the proposed order or judgment."

Mr. Raymond, as the nonprevailing party, was to receive 5 days' notice of presentation and 5 days' notice of the specific time and the place of presentation before the trial court could properly enter the judgment. The rules do not require that the final papers also be served within that time frame. Mr. Raymond acknowledges that the notice

was provided by Judge Cozza in a letter dated January 11, 2008. The requisite notice was provided.

Next, Mr. Raymond claims that the proof of service of copies of the proposed findings of fact and conclusions of law is insufficient. If a party is not represented by counsel after the commencement of the action, service is made upon the party. CR 5(b)(1).

Mr. Raymond correctly notes that service by mail as permitted by CR 5(b)(2)(A) refers to the United States Postal Service. Therefore, delivering papers to a private courier service such as Federal Express does not constitute service by mail under the rule. *Cont'l Sports Corp. v. Dep't of Labor & Indus.*, 128 Wn.2d 594, 602, 910 P.2d 1284 (1996). CR 5(b)(2) includes a subsection that identifies that proof of mailing can be shown: "by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney." CR 5(b)(2)(B).

Another section of the rule, CR 5(b)(1), permits service to be made on a pro se party by handing the copy directly to the party. The rule does not specify what is required for proof of service. *Sunderland v. Allstate Indem. Co*., 100 Wn. App. 324, 328, 995 P.2d 614 (2000).

Our courts have held that proof of service under CR 5(b)(1) is adequately shown when the proof of service indicates the time, place, and manner of service. *Sunderland*,

100 Wn. App. at 329. In *Sunderland*, proof of service was sufficient by a combination of two documents: a signed certificate indicating the time and manner of delivery and a "received" stamp showing the date and the law firm on the document served. *Id.*; *cf. Terry v. City of Tacoma*, 109 Wn. App. 448, 36 P.3d 553 (2001) (remanding to determine if the city attorney's "received" date stamp on the subject document was adequate to show the manner of delivery in the absence of a certificate of service).

Here, a declaration was signed identifying the documents and stating that they were placed in an envelope and addressed to Mr. Raymond's home, and the envelope was given to the private courier. Attached to the declaration was the private courier's receipt showing the time, date, and person the envelope was delivered to at Mr. Raymond's home. The proof of the time, place, and manner of delivery is adequately shown.

d. Basis for child support

Mr. Raymond challenges the amount of income imputed to him for child support purposes. A trial court's award of child support, including imputation of income, is reviewed for an abuse of discretion. *In re Marriage of Shui*, 132 Wn. App. 568, 588, 125 P.3d 180 (2005). The trial court abuses its discretion if it exercises its discretion on a ground, or to an extent, that is clearly untenable or manifestly unreasonable. *In re Marriage of Curran*, 26 Wn. App. 108, 110, 611 P.2d 1350 (1980).

RCW 26.19.071(1) requires that, in general, "All income and resources of each

parent's household shall be disclosed and considered by the court when the court determines the child support obligation of each parent." Social Security disability income must be disclosed but it is not included in determining a party's gross income. RCW 26.19.071(4). The trial court here found:

> Father has received Social Security Disability since his retirement in 2004. The monthly amount of his disability is now approximately $1,900.00. He has been working under the table since earlier this decade with a home cable manufacturing business called Raymond Cables. Father admitted at deposition that the business grossed more than $300,000.00, employing at least one employee, but has no accounting records to show income or expenses. These business operations have continued, to a smaller degree, even during the dissolution case. Wife believes income, in addition to his disability payments, should be imputed due to these clandestine income-generating activities. In the absence of actual numbers, the Bureau of Labor and Statistics, National Census amounts for a man of father['s] age group should be used. It is that net imputed income amount which wife proposes.

Clerk's Papers (CP) at 255.

A court must impute income to a parent who is voluntarily unemployed or underemployed in order to prevent a parent from avoiding his or her child support obligation. RCW 26.19.071(6). This court has held, "It is consistent with the plain language of the statute and its underlying purpose to consider a parent who conceals income in order to escape his or her support obligation as voluntarily underemployed or voluntarily unemployed for purposes of imputing income under RCW 26.19.071(6)." *In re Marriage of Dodd*, 120 Wn. App. 638, 645, 86 P.3d 801 (2004).

In *Dodd*, we affirmed an order of child support based on the imputed income of a parent where there was evidence that the father was funneling income through his girl friend and the trial court found that the father was dishonest in stating his income. *Id.* at 640-42, 645-46. Division Two of this court followed *Dodd* in a case where the father had contributed to the family income before separation, he did not refute his wife's statements about his income, and the trial court did not find credible the father's statement that he had no income. *In re Marriage of Didier*, 134 Wn. App. 490, 498, 140 P.3d 607 (2006).

Here, based on the court's finding that Mr. Raymond continued to conduct an under-the-table business, the trial court imputed to him a net monthly income of $2,846. The child support obligation was $510.08.[2]

The court then properly considered the $920 monthly payment made directly to the child due to Mr. Raymond's disability income. Because that payment exceeded Mr. Raymond's child support obligation, no prospective support was then owed. The court retained jurisdiction to activate Mr. Raymond's child support if the disability payments ceased to be made to the child.

Mr. Raymond has failed to identify an abuse of discretion. He merely argues that there was insufficient proof to establish his income. This is precisely the reason income

[2] The child support order identifies the child support obligation as $510.08. The child support worksheet, however, sets forth Mr. Raymond's presumptive child support obligation as $509.40. There is no explanation for this discrepancy.

is imputed.

e. Restraints on visitation

Mr. Raymond contends that language in the parenting plan that restricts his contact with his child conflicts with language that permits his child to see him if the child wishes to see him. Restrictions in a parenting plan are reviewed for abuse of discretion. *In re Marriage of Kovacs*, 121 Wn.2d 795, 801, 854 P.2d 629 (1993). A court abuses its discretion when its decision is based on untenable grounds or reasons, or is manifestly unreasonable. *Id*.

RCW 26.09.191(2)(a) requires restriction of residential time when the court finds that the parent has engaged in: "Willful abandonment that continues for an extended period of time or substantial refusal to perform parenting functions" or "a pattern of emotional abuse of a child." The court restricted Mr. Raymond's contact with his child upon making these findings.

The court went on to state:

> The child's concerns about the father are genuine and are not the result of undue influence by the mother. Jenna Raymond is of sufficient age (she will be an adult in approximately 1/2 year) and discretion to warrant this court giving great weight to her wishes under RCW 26.09.187.

CP at 244.

This language implies that Mr. Raymond's 17-year-old child voiced concerns to

which the court paid heed. RCW 26.09.187(3)(a)(vi). Mr. Raymond suggests that the trial court also mentioned to Mr. Raymond on the record that the child may see him if she wishes. As Mr. Raymond acknowledges, he did not obtain a transcript of the hearing in which this was stated. Mr. Raymond has failed to show an abuse of discretion in the restraint ordered on the record before us.

f. Asset distribution

Mr. Raymond challenges the court's distribution of certain assets and liabilities. Trial courts have broad discretion in the distribution of property and liabilities in marriage dissolution proceedings under RCW 26.09.080. Such distribution will be disturbed on appeal only if the trial court manifestly abuses its discretion. *In re Marriage of Brewer*, 137 Wn.2d 756, 769, 976 P.2d 102 (1999).

All property, both community and separate, is before the court for distribution in a dissolution. *Friedlander v. Friedlander*, 80 Wn.2d 293, 305, 494 P.2d 208 (1972); *In re Marriage of Griswold*, 112 Wn. App. 333, 339, 48 P.3d 1018 (2002). When distributing the property, the court considers, among other factors: (1) the nature and extent of community property, (2) the nature and extent of separate property, (3) the duration of the marriage, and (4) the economic circumstances of the parties. RCW 26.09.080. The goal is a fair and equitable distribution. RCW 26.09.080.

The appellate court reviews de novo the trial court's characterization of separate

and community property. *In re Marriage of Chumbley*, 150 Wn.2d 1, 5, 74 P.3d 129 (2003). It will reverse the underlying factual findings only if substantial evidence does not support them. *Griswold*, 112 Wn. App. at 339. "Substantial evidence exists if the record contains evidence of sufficient quantity to persuade a fair-minded, rational person of the truth of the declared premise." *Bering v. SHARE*, 106 Wn.2d 212, 220, 721 P.2d 918 (1986) (citing *In re Welfare of Snyder*, 85 Wn.2d 182, 185-86, 532 P.2d 278 (1975)).

Mr. Raymond only generally disputes aspects of the property distribution, which concern his separate property and the sources of funds used to make the house payment. As noted, Mr. Raymond did not provide the record. He does not challenge specific findings or point out evidence to verify his claims and no such evidence can be discerned in the record on appeal.

The trial court identified and distributed the separate and community property and debts. The court made two findings relevant to Mr. Raymond's contentions on appeal regarding property and debt distribution. First, it found that Mr. Raymond had deposited in a separate account the $282,207.65 proceeds from a 2004 distribution of the parties' Quintex Employee Stock Ownership Plan (ESOP). Ms. Raymond did not have access to or discretion over the funds, the past use and current balance of which was unknown at trial. Second, Mr. Raymond ran a business, which he misled Ms. Raymond into believing was merely a hobby, rather than a revenue-producing venture. In his deposition, Mr.

Raymond admitted that at least $343,126 had been made from retails sales, but he claimed that he kept no records and produced no other evidence related to the business. As a result, the court made Mr. Raymond responsible for any tax liability arising from the ESOP distribution and clandestine business.

With these facts in mind, it is not difficult to justify the trial court's award of the family home to Ms. Raymond, which had a value of $222,000.

Mr. Raymond has not shown that the trial court considered improper factors or that the property was improperly characterized. Mr. Raymond vaguely complains that he had many household goods that he brought into the marriage. The decree shows that he was awarded that separate property. Mr. Raymond fails to show an abuse of discretion in the distribution of the assets and liabilities.

Mr. Raymond also complains that the judgment summary lists a judgment owed by him in favor of Ms. Raymond in the amount of $19,673.15 under the category as "other." CP at 298. This is the amount of the judgment that Ms. Raymond had to pay for a loan taken out in her name by her husband, which was explained in the decree.

g. Judicial bias

Mr. Raymond claims that his trial and pretrial hearings were tainted by judicial bias. The appearance of fairness doctrine seeks to insure public confidence by preventing a biased or potentially interested judge from ruling on a case. *See State v. Carter*, 77 Wn.

App. 8, 12, 888 P.2d 1230 (1995) (citing *State v. Post*, 118 Wn.2d 596, 619, 826 P.2d 172, 837 P.2d 599 (1992)). Under the appearance of fairness doctrine, a judicial proceeding is valid only if a reasonably prudent and disinterested person would conclude that all parties obtained a fair, impartial, and neutral hearing. *State v. Bilal*, 77 Wn. App. 720, 722, 893 P.2d 674 (1995).

To show a violation, Mr. Raymond must present evidence of the judge's actual or potential bias. *Post*, 118 Wn.2d at 619. Mr. Raymond points to no such evidence. A trial court is presumed to perform its functions regularly and properly without bias or prejudice. *Wolfkill Feed & Fertilizer Corp. v. Martin*, 103 Wn. App. 836, 841, 14 P.3d 877 (2000) (citing *Kay Corp. v. Anderson*, 72 Wn.2d 879, 885, 436 P.2d 459 (1967)). Mr. Raymond has not rebutted the presumption.

h. Attorney fees on appeal

Ms. Raymond devotes a large section of her brief to justify the trial court's award of attorney fees on the basis of Mr. Raymond's intransigence. Mr. Raymond did not appeal the award.

Ms. Raymond also seeks attorney fees on appeal. She bases the request "under RAP 18.1 [and] the cases cited" in the section justifying her fees on the trial level. Resp't's Br. at 27. She argues:

> It is reasonable and appropriate for the Appellate Court to conclude that Appellant's clear history of intransigent behavior remains unchanged

> and is further perpetrated on appeal with no justification and to Respondent's substantial prejudice. His baseless, repetitive and improper pleadings and procedure practices injure Respondent by forcing her back to court to answer and defend.

*Id*.

Intransigence is a basis for awarding fees on appeal, separate from RCW 26.09.140 (financial need) or RAP 18.9 (frivolous appeals). *Chapman v. Perera*, 41 Wn. App. 444, 455-56, 704 P.2d 1224 (1985). This court has discretion to grant attorney fees on appeal. RAP 18.1. But such an award is not warranted here.

First, it appears that Ms. Raymond's request for fees is, at least in part, based on Mr. Raymond's conduct for which he has already paid. In other words, Ms. Raymond has not shown that Mr. Raymond made or used baseless, repetitive, and improper pleadings or procedures that required her to defend them in this court.

Second, it is difficult to see how Mr. Raymond was intransigent on appeal. "Intransigence is the quality or state of being uncompromising." *In re Marriage of Schumacher*, 100 Wn. App. 208, 216, 997 P.2d 399 (2000). Washington courts have found intransigence as a basis for attorney fees when a party engages in obstructive behavior or delay tactics, files unnecessary motions, fails to cooperate with counsel, or participates in other activities that make trial unduly difficult or that increase legal costs unnecessarily. *E.g.*, *In re Marriage of Foley*, 84 Wn. App. 839, 846, 930 P.2d 929

(1997); *In re Marriage of Crosetto*, 82 Wn. App. 545, 564, 918 P.2d 954 (1996); *In re Marriage of Greenlee*, 65 Wn. App. 703, 708, 829 P.2d 1120 (1992).

The record supports the finding that some of Mr. Raymond's conduct on the trial court level did constitute intransigence, i.e., his failure and refusal to provide documentation related to community finances, especially as concerns the ESOP and his business. But even then, the trial court did not hold Mr. Raymond responsible for all of Ms. Raymond's attorney fees.

Pro se litigants are held to the same rules of procedure and substantive law as attorneys. *Westberg v. All-Purpose Structures, Inc*., 86 Wn. App. 405, 411, 936 P.2d 1175 (1997). Mr. Raymond was held to that standard here though it is evident that he had little understanding of the procedural or substantive law in his case. The general tenor of his brief on appeal shows a clear lack of acumen. But it is not obstructively or abusively so.

## CONCLUSION

We conclude that Mr. Raymond presents no reversible issues on appeal. We affirm and deny Ms. Raymond's request for attorney fees.

A majority of the panel has determined that this opinion will not be printed in the Washington Appellate Reports but it will be filed for public record pursuant to RCW 2.06.040.

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Schultheis, C.J.

WE CONCUR:

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Sweeney, J.

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Korsmo, J.